Supreme Court of the United States.

OCTOBER TERM, A. D. 1874.

No. 82.

EDWARD DUPASSEUR, PLAINTIFF IN ERROR,

vs.

ALBIN ROCHEREAU, DEFENDANT IN ERROR.

Writ of Error to the Supreme Court of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

LOUIS JANIN,
Of Counsel.

JUDD & DETWEILER, PRINTERS.

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BRIEF FOR DEFENDANT IN ERROR.

In this case, the defendant in error, by the undersigned counsel, made, about two years ago, a motion and filed a printed argument, moving the court to dismiss this writ of error for want of jurisdiction.

The plaintiff in error also filed a printed brief, but he did not seem to be aware that this is a case at law, and that this court held in Delmas *vs.* Insurance Co., (14 Wall., 667,) that it has been long settled "that under the act of 1824, and on account of the peculiarity of the practice of the courts of that State, (Louisiana,) the opinions delivered by the appellate court of Louisiana are treated by us as a part of the record, and are looked into to learn what they decided, when their judgments are brought here by writ of error."

The court wants to know what the appellate court of Louisiana decided, like the verdict of a special jury, but will not inquire whether that court decided the facts correctly upon the evidence submitted to it; but when the undersigned made his argument for dismissing the writ of error for want

of jurisdiction, he found, after having given three weeks' notice as required by a recent rule of this court, on file in the clerk's office an ingenious brief on the merits of the case as if this was a suit in equity before this Honorable Court. Having in this particular, as he supposes, the sad advantage of age over his learned adversary, he will not follow him in this course of argument, but will return to the grounds assumed by him when he made the motion to dismiss the case for want of jurisdiction. This Honorable Court ordered that motion to be argued together with the merits of the case; but the undersigned being perfectly convinced that the want of jurisdiction is clearer and can be more clearly shown than any other part of the case, takes the liberty of reverting thereto and insisting upon it particularly, and quotes at length the opinion of the supreme court of Louisiana in this very case. (Rec. p. 74.)

Opinion of the Court, filed May 23d, 1870.

A. ROCHEREAU
vs.
E. DUPASSEUR. } No. 1909.

Appeal from the sixth district court for the parish of Orleans.

Mr. Justice Howell delivered the opinion of the court in the words and figures following, to wit:

The plaintiff seeks to enforce against the property of defendant, a third possessor, a mortgage, which was recorded on 20th March, 1858.

The defendant holds by virtue of a sale made under a judgment recognizing a mortgage and vendor's privilege, inscribed on 8th July, 1852, and re-inscribed on 15th May, 1865.

He contends that this reinscription was made as soon as it was possible for him to do so, and he introduced proof that unsuccessful efforts were made from May to November or December, 1862, to get a permit from the military commander in this city to go to the parish of St. Charles, where the property is situated, to reinscribe the mortgage. In Decem-

ber the permit was obtained, and a messenger sent to attend to it, but the court-house was locked up and the key in possession of the sheriff or his deputy, who were absent. Two similar efforts were afterwards made with like results. The recorder's office was open in September, 1864; the reinscription was made in May, 1865. There was then a time during which it could have been made, even if the causes shown would have excused the defendant and served the effect of inscription.

He contends, further, that a judgment rendered by the second judicial district court in the case of Jacobs *vs.* Sauvé, the original vendor and vendee, ordering the money claimed to be brought in court, superseded the necessity of inscription, as a judgment is the highest evidence of a claim, and all other evidence of the debt or other legal right is merged in the judgment.

This is a confounding of the evidence of a debt with an act of mortgage securing the debt, and by art. 3333 C. C. a reinscription can be made only in the manner that the inscription is made.

But he contends that as to plaintiff a reinscription was unnecessary, because in his act of mortgage the one under which defendant holds was recited, and plaintiff cannot be considered a third person, but is affected with knowledge, and bound as though he were a party, under articles 3314, 3315, 3316, C. C.

This point was directly put in the case of Britton & Koontz *vs.* Janney, 21 An., 204, and decided adversely to the proposition of the defendant herein. It was in these words: "The reinscription of their mortgage was rendered unnecessary by the inscription of the Shaw mortgage wherein their note and mortgage were clearly set forth," that is, as counsel say in this case, by an acknowledgment of defendant's mortgage by plaintiff himself, in an authentic act to which he is a party, and under which he claims his mortgage rights, a reinscription was rendered unnecessary. The Shaw mortgage in the case cited must have contained a recital and acknowledgment of the Britton & Koontz mortgage to the same purpose and effect as that of the plaintiff here. It was held in said case that this did not operate a reinscription of the acknowledged mortgage, nor supply the omission to reinscribe as the law requires, and for the object intended. Mrs. Shaw, by the said recital in her act of mortgage, had the same knowledge of

Britton & Koontz' mortgage, as plaintiff's Rochereau had, by the like recital and acknowledgment in his act of the existence of the defendant's mortgage. The failure to reinscribe in such case produces the same effect, that is, the loss of the rank held by the mortgage which should have been reinscribed.

A reinscription is necessary and it must be made in the manner prescribed. (Art. 3333 of the code.) To adopt the theory of defendant would be an evasion, if not a total overthrow, of our system of registration, established by existing laws.

In the case of Harang *vs.* Plattsmier, 21 A., 427, we held that knowledge is not equivalent to registry in Louisiana, but that under the law, as it now stands, which must control art. 3315, 3316, if inconsistent; an unrecorded act of mortgage is utterly null and void, except between the parties to the act, and we have concluded to adhere to that ruling. Rochereau, the plaintiff, was not a *party* to the act between Jacobs and Sauvé, under which the defendant Dupasseur holds.

All the questions of law raised in this case have been passed on by this court and are considered settled.

The motion to dismiss is unfounded.

It is therefore ordered that the judgment appealed from be affirmed."

The correctness of this decision of the supreme court of Louisiana is impugned upon the authority of the case of Patterson *vs.* de la Ronde, (8 Wall., 292,) in which this court held that the general doctrine, that where registry of conveyances and mortgages is required, knowledge of an existing conveyance or mortgage is in legal effect the equivalent of notice by the registry, is also the law of Louisiana, according to a correct interpretation of act 3333 of the civil code of that State. A contrary conclusion would be repugnant to the sentiment of equity which should be the basis of all judicial action; but yet such is the law of Louisiana, as appears from the more recent case of Harrang *vs.* Plattsmier, which we transcribe here from the 21st volume of Louisiana Annual Reports, p. 427, and which is based, not upon article 3333

of the civil code, but upon more recent and express legislation of 1855:

L. P. HARRANG, MICHAEL J. HAUCK, Subrogated,
vs.
JOHN T. PLATTSMIER, *et al.* } No. 2235.

A notarial act of mortgage has no effect against third parties until it is registered in the office of the recorder of mortgages for the parish where the property is situated. Acts of 1855, No. 274, Sec. 1, page 335.

Where three separate mortgages have been executed on the same piece of property at different dates, and the last of the three is recorded first, and the property has been sold to pay them, the proceeds must be applied by preference to the payment of the mortgage first recorded. The fact that the last mortgage had notice of the existence of the other two mortgages of prior date will not avail.

Appeal from the seventh district court of the parish of Orleans, Collens, J.; Braughn & Ogden for plaintiff and appellee, Frank Haynes and T. A. Bartlette for appellants, Ludeling, C. J.

On the twenty-fourth of April, 1867, John T. Plattsmier executed, before A. Mazureau, a notary public, an act of mortgage in favor of Charles G. Baquié for $2,250, and interest.

The notes thus secured by mortgage were endorsed by M. J. Hauck, for the accommodation of Plattsmier. On the third December, 1867, Plattsmier executed another mortgage on the same property in favor of Michael J. Hauck, for $1,900. On the thirty-first day of December, 1867, still another mortgage was given on the property by Plattsmier in favor of Weaver to secure a debt due him for $1,717.

In this last act of mortgage the two first mortgages are referred to as existing on the property.

The property mortgaged has been sold, and the contest is over the proceeds thereof. The two first mortgages were not recorded until after Weaver's mortgage. It appears from the evidence that Weaver had knowledge of the existence of the two first mortgages.

Under the circumstances can he take advantage of the want of registry of the two first mortgages?

The act of the General Assembly, No. 285, approved on the 15th of March, declares, "that acts, whether they are passed before a notary public or otherwise, shall have no effect against third persons but from their registry."

Section 9. Another statute, No. 274, entitled, "An act relative to registry," declares "that no notarial act concerning immovable property shall have any effect against third persons, until the same shall have been recorded," &c. The second section directs how and where the acts shall be recorded, and it provides further, "that all sales, contracts, and judgments, which shall not be so recorded shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording." Acts of 1855, page 335.

"This is the last expression of the legislative will upon the subject, and it is clear, precise, and contains no exception or qualification." Whether the laws be good or bad, is immaterial; courts are bound by them, and must determine the rights of litigants in accordance with their provisions.

The lawgiver, it would seem, was determined to settle the vexed question whether knowledge was equivalent to registry in Louisiana, and he declared it was not. "All sales, contracts, and judgments which shall not be so recorded, shall be utterly null and void, except between the parties." It cannot be pretended that Weaver was a party to the mortgages in favor of Baquié or Hauck. They were, therefore, null as to him, and could not affect his rights.

We concur in the views expressed by Mr. Chief Justice Merrick, in the dissenting opinion in Swann *vs.* Moore, (14 An., 838.) See, also, 7 O. S., 662; 2 La., 125; 4 La., 241; 6 La., 541; 11 La., 342; 3 R., 160; 6 R., 314; 9 R., 14; 11 R., 56; 1 An., 249; 2 An., 598, 788; 6 An., 772; 4 An., 269.

The view we have taken of this case makes it unnecessary to notice the bill of exceptions.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be avoided and reversed, and that there be judgment recognizing the mortgage in favor of W. D. Weaver, as first in rank, and entitled to be paid out of the proceeds of the sale of the mortgaged property in the hands of the sheriff by preference.

It is further ordered, that the plaintiff pay the costs of both courts.

In this latter case, the supreme court of Louisiana pointedly admits that the law which it enforced is bad, but yet declares that it is bound to enforce it, not being the Legislature. *Sed ita lex scripta est.* This writ of error presents the naked question, whether this court has jurisdiction to overrule the decision of the supreme court of Louisiana upon the interpretation of a State law, because that State law is bad and unreasonable.

The question how the advantage in rank of a mortgage may be lost in Louisiana does not present a "Federal question" any more than the various cases in which this court refused to annul decisions of the same supreme court upon contracts for the purchase price of slaves, or upon notes given for the loan of Confederate currency, when the jurisprudence of the said supreme court was in direct opposition to the jurisprudence and views of this, the highest court of the land.

Bethel *vs.* Demaret, 10 Wall, 537.
West Tennessee Bank *vs.* Citizens' Bank, 13 Wall., 432.
Palmer *vs.* Marston, 14 Wall., 10.
Delmas *vs.* Insurance Co., 14 Wall., 661.

This is the theory of the leading case of Thorington *vs.* Smith, 8 Wall., 1.

The ground for the allowance of the writ or error, stated by plaintiff in error in his petition for the allowance of the writ, (Rec., p. 76,) is as follows:

"That he set up and claimed, as a defence to plaintiff's action, a right and title under an authority exercised under the United States, and the decision aforesaid of this Honorable Court was against such right and title so specially set up and claimed, that is to say, defendant claimed and set up title to the property in controversy through a sale made to him by the United States marshal, under a decree of the United States circuit court in and for the sixth circuit and district of Louisiana, and the decree complained of was against the title and right so set up."

The judgment of the United States circuit court above alluded to is found on pp. 53, 54 of the record.

It will be observed that the only defendant in that suit was Sauvé, the mortgagor.

The present defendant in error was no party to the suit or to any proceedings connected with it. The plaintiff in error, indeed, asserted in his plea to the jurisdiction of the State court, (Rec., p. 16,) that Rochereau was a party to proceedings in the circuit court for the distribution of a balance of purchase money of the mortgaged premises paid into court by Dupasseur, but there is nothing in the record to justify the assertion.

Under the judgment of the circuit court, the mortgaged property was sold by the marshal, and bought in (Rec., p. 30) by Dupasseur, who thus acquired the legal title to it, and became, in the language of the law of Louisiana, the third possessor thereof.

Thereupon the defendant in error, being also a mortgagee of the property, and having already obtained judgment against Sauvé, the mortgagor, in another suit, (Rec., p. 29,) brought suit against Dupasseur as such third possessor, not denying that Dupasseur had acquired the legal title by virtue of the judgment of the United States circuit court and the marshal's sale thereunder, but, on the contrary, suing him for the precise reason that he had so acquired the legal title and possession.

The petition of Rochereau sets out, (Rec., p. 2:) "That one Edward Dupasseur, residing in the city of New Orleans, has taken and now holds possession of the said plantation as owner thereof; that said plantation is affected in his hands with the special mortgage hereinafter set forth, resulting from the said act of the 26th February, 1858, and its inscription as aforesaid in the said parish of St. Charles, and is bound for the full amount thereof; and that, in the premises, the said Dupasseur is bound either to pay to your petitioner the amount thereof, or to relinquish and deliver

up the said mortgaged property to be sold, according to law, to satisfy the same."

This action against Dupasseur was what is called in Louisiana an hypothecary action, and is thus described in Art. 68 of the Code of Practice of Louisiana:

"Art. 68. If the hypothecated property be neither in the possession of the debtor nor of his heirs, but in that of a third person, the creditor has his action against that person in order to compel him either to give up the property, or pay the amount for which it stands hypothecated. This is the hypothecary action, properly speaking."

In such an action, of course, no personal claim is made against the defendant, and accordingly the judgment of the court of first instance in this case, (Rec., p. 61,) was simply that Dupasseur should "relinquish and deliver up said mortgaged property to be sold according to law," &c., unless he preferred to pay what Sauvé owed to Rochereau.

This judgment was affirmed by the Supreme Court, (Rec., p. 74.)

How can it be pretended that by this affirmance the Supreme Court of Louisiana decided against any right or title claimed by Dupasseur under the judgment of the Circuit Court and the marshal's sale?

The only serious question before the Supreme Court was whether or not Rochereau's mortgage, though posterior in date to that of Dupasseur, had acquired priority over it through Dupasseur's failure to have his mortgage re-inscribed in time.

That question was not presented to or passed upon by the circuit court; it could not be, for the only party interested in urging it, or who had a right to urge it was Rochereau, and he was not a party to the action. The judgment of the circuit court rendered against Sauvé alone, could not decide *as between Rochereau and Dupasseur*, that the mortgage of Dupasseur had priority over that of Rochereau.

If the plaintiff in error is to be understood as asserting

that he made a claim to that effect in the courts below, and that this court has acquired jurisdiction through the rejection of that claim, then we answer that the claim is utterly preposterous, frivolous, and unreasonable; that it could not have been seriously presented to or considered by the supreme court of Louisiana, and its tacit rejection is no ground for jurisdiction here. The supreme court does not expressly say a word about it.

If, on the contrary, his claim was only that he had acquired the legal title to the property, then we answer that neither we nor the supreme court ever denied that fact. We submit, therefore, that this writ of error should be dismissed for want of jurisdiction.

If, however, this court should consider that it has jurisdiction, it would seem that it will follow the decision of the State supreme court.

That decision turned upon a matter peculiarly local, to wit: the interpretation of a State statute as to the registry of mortgages. We may observe here, that the decision of the State supreme court was based not alone upon the articles of the civil code applicable to the matter, but also upon certain statutes of 1855. See Harang *vs.* Plattsmier, cited in the opinion in the present case in the following words: "In the case of Harang *vs.* Plattsmier, (21 A, 427,) we held that knowledge is not equivalent to registry in Louisiana, but that *under the law as it now stands, which must control Arts.* 3315, 3316, *if inconsistent*, an unrecorded act of mortgage is utterly null and void, except between the parties to the act," &c.

On the other hand, the decision of this court in Patterson *vs.* De la Ronde, (8 Wall., 292,) holding that knowledge is equivalent to re-inscription, seems to have been based solely upon Art. 3333 of the civil code. As far as appears from the report of the case, the statutes of 1855 were not brought to the attention of the court at all.

These statutes, it seems, were passed expressly to settle a

question which had been much vexed in Louisiana. In Harang *vs.* Plattsmier the supreme court of Louisiana says, in allusion to them: "The lawgiver, it would seem, was determined to settle the vexed question whether knowledge was equivalent to registry in Louisiana, and he declared it was not."

As a matter of course, if by the law of Louisiana knowledge is not equivalent to original registry, it is not equivalent to the renewed registry or re-inscription within ten years, required by Art. 3333 of the civil code, and so the supreme court of Louisiana has held in the present case.

But the plaintiff in error claimed in the courts below that he was excused for his failure to re-inscribe his mortgage within ten years, by the impossibility of obtaining access to the proper recorder's office. His mortgage was inscribed July 8, 1852, (see Opinion,) and should regularly have been re-inscribed on or before July 8, 1862. It was not so re-inscribed, however, until May 15, 1865. It appears from the Opinion of the Supreme Court, that he made unsuccessful efforts from May, 1862, to re-inscribe it, but that in September, 1864, the recorder's office was open, and he might have had it re-inscribed then, but failed to do so until May 15, 1865, some seven or eight months later.

Now, it has been repeatedly held in Louisiana, that inscriptions are not subject to the rules of prescription, or, in other words, that the time for making an inscription is not extended by such causes as would prevent the running of prescription. In Robinson & Cruzat *vs.* Haynes, 19 A. R., 133, and Britton & Koontz *vs.* Norment, 20 A. R., 508, the attempt was made to apply to the registry laws of Louisiana the rules relating to prescription, but the idea was pointedly rejected by the Supreme Court as unfounded in law. In the former case, that of Robinson & Cruzat *vs.* Haynes, the Supreme Court declared "that an inscription ceases to be evidence of the mortgage after the lapse of ten years, *and is not subject to the rules of prescription.*" In the latter case, of

Britton & Koontz *vs.* Norment, the point was again pressed upon the court that the inscription of mortgages is subject to the laws and maxims applicable to prescription, and that *prescription was suspended during the war.* But the point was again overruled, the court citing with approval the case of Robinson & Cruzat, and declaring emphatically that they adhered to the doctrine there laid down. In view of these decisions, and that of Harang *vs.* Plattsmier, 21 A. R., 427, it must be considered as settled in Louisiana, that nothing can supply the want of inscription and re-inscription, in the preservation of hypothecary rights.

But again, if there were any foundation in law for the theory of excuse set up by the plaintiff in error, it could have no further effect than this, to wit, to entitle him to consider as his, for the purpose of re-inscribing, after the re-opening of the recorder's office, and the removal of all obstacles to access thereto, that portion of his original period of ten years which still remained to him when the office became inaccessible—that is, from May, 1862, to July 8, 1862, say sixty or seventy days in all. Upon his own showing, this was all that remained to him of *tempus utile* in which to re-inscribe, and it clearly follows that this was all he was entitled to after the re-opening of the office in September, 1864, yet we find from the opinion of the supreme court that, though he might have re-inscribed in September, 1864, he neglected to do so until May, 1865, some seven or eight months later.

At the latest, he should have re-inscribed some time in December, 1864.

Upon this point the opinion says, (Rec., p. 74:)

"The recorder's office was open in September, 1864. The re-inscription was made in May, 1865. There was then a time during which it could have been made, even if the causes shown would have excused the defendant, and served the effect of inscription."

Another point made by plaintiff in error, and noticed in

the opinion, was that he was dispensed from re-inscription, because G. R. Jacobs (the original mortgagee of Sauvé, and who subsequently transferred his mortgage to Dupasseur,) had brought suit in 1863, (Rec., pp. 44, 45,) against Sauvé on his mortgage, and the court made an order that the amount due on the mortgage should be paid into the hands of the sheriff, "to be by him [held] subject to the further order of this court," and that further proceedings should be suspended until the decision of another suit. As to this the supreme court says, in its opinion in the present case:

"He [plaintiff in error] contends that a judgment rendered by the second judicial district court in the case of Jacobs *vs.* Sauvé, the original vendor and vendee, ordering the money claimed to be brought into court, superseded the necessity of re-inscription, as a judgment is the highest evidence of a claim, and all other evidence of the debt, or other legal right, is merged in the judgment. This is a confounding of the evidence of a debt with an act of mortgage securing the debt, and, by article 3333 C. C., a re-inscription can be made only in the manner that the inscription is made."

We suppose this court will not look into the evidence in the record, but if it does, it will find that there was never any final judgment in the case of Jacobs *vs.* Sauvé, and that while it was pending, Jacobs transferred his mortgage to Dupasseur, who thereupon brought suit on it in the United States circuit court.

It seems utterly unreasonable to suppose that this court will question the decision of the supreme court of Louisiana on such a point. All that is shown in regard to it by the opinion is that in the case of Jacobs *vs.* Sauvé there was an order that money be brought into court. We forbear to trouble this court any further about it.

Respectfully submitted,

LOUIS JANIN,
Of Counsel.

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ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

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Pursuant to the request of the court, upon the question:

"Whether the proceedings, filed in the Circuit Court of the United States, by Edward Dupasseur on the first day of December, 1863, for enforcing the vendor's privilege, on the property in controversy, was not a proceeding *in rem*, binding on Rochereau and all other persons claiming liens thereon, without making them actual parties."

In nearly every State of the Union, there exists some statutory proceeding *in rem* for the foreclosure of mortgages upon real estate. In many of the States, prom-

inently Pennsylvania, Iowa and Illinois, this is called a *scire facias*, and is held to be a proceeding *in rem* to enforce a specific lien, and not to obtain a judgment *in personam*. It creates no lien on other property, and only directs a sale of the mortgaged premises, to satisfy the mortgage debt and costs.

Woodbury v. *Manlove*, 14 Ills., 213.
Osgood v. *Stevens*, 25 Ills., 89.

No defense can be interposed to such a proceeding except payment, discharge, release, or satisfaction, or that the mortgage was never *a valid lien* on the land.

White v. *Watkins*, 23 Ills., 480.
Carpenter v. *Mooers*, 26 Ills., 162.

It is a proceeding at law, and governed by practice of courts of law, and not courts of equity. *No persons but the mortgagor, or if dead, his executor, or administrator, are required to be made parties to such a proceeding.* Assignees in bankruptcy, as well as *subsequent purchasers and incumbrancers, are required to take notice of proceedings* by *scire facias*, and to protect their own rights.

Chickering v. *Failes*, 26 Ills., 507.
Danord v. *Kelly*, Dallas Pa., 142.
Hartman v. *Clarke*, 11 Ia., 510.

It is to be regretted that no treatise exists to which the court can be referred, upon the peculiar and complex jurisprudence of Louisiana. Derived as her laws are, from the Spanish and French codes, modified by legislative enactments, a solution of many of the complicated questions peculiar to her jurisprudence, can only be obtained by an examination of the Civil Code and Code of Practice and the decisions of her supreme court under them, a method always laborious, and often peculiarly unsatisfactory.

By the law of Louisiana, a proceeding to foreclose a mortgage is styled "an hypothecary action." "The hypothecary action is a real action which the creditor

brings *against the property* which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt." C. P., Art. 61.

"The hypothecary action, like all real actions, *follows the property to which it is attached, in whatever hands it may be found*, but it is subject to different rules, according as the property may be in the possession of the debtor, his heirs, or third persons." C. P., Art. 62.

Articles 63 to 74 prescribe the rules of procedure governing this action, which the Supreme Court of Louisiana has declared to be *essentially a proceeding in rem.*

Moore v. *Allain*, 10 La. Rep., 490. If the creditor holds a mortgage importing a confession of judgment, *i. e.*, executed before a notary public, and two witnesses, C. P., 733, he may (if the property be still in the possession of the debtor) have judgment entered up in court, as on a *cognovit* at common law, and obtain immediate execution without citing the debtor. This is styled "executory process," "*via executiva.*" If, however, the mortgage is not of this character, as if made by private act between the parties, the creditor brings a regular suit to foreclose, cites the debtor and obtains judgment before sale. This is the *via ordinaria.* C. P., Art. 98. In either case, if the property has been conveyed to, and *passed into the possession of a third person*, the creditor cannot enforce his mortgage without having made thirty days previous amicable demand for payment *upon the debtor* or his heirs. C. P., Art. 69.

By the Civil Code of Louisiana—

"The mortgage has the following effects: First, that *the debtor cannot sell, engage or mortgage* the same property *to other persons, to the prejudice of the mortgage*, which is already acquired to another creditor." C. C., Art. 3360, (3397.) This provision is also usually inserted in every mortgage "by authentic act," *i. e.*, passed before a Notary Public, as follows: "He the said mortgagor, *promising*

not to sell or alienate the said plantation and slaves TO THE PREJUDICE OF THIS ACT." (Printed Rec., p. 13.) And is called the "*pact de non alienando.*") In all cases, where the mortgage contains this pact, the creditor may proceed against the property as if it still belonged to the mortgagor—even though it be in possession of a third person, to whom it has been conveyed by the debtor—without making any person a party to his proceeding but the debtor.

Nathan v. *Lee*, 2 Martin, (new series,) La. Rep. 267.

Martin v. *Jundot*, 2 Robinson, La. Rep., 278: The well-known effect of this *pact* is to make every alienation or transfer of the mortgaged property *null and void* as relates to the mortgage creditor.

Lawrence v. *Burthe*, 15 La. Rep., 267. And it is not necessary to make a subsequent purchaser or incumbrancer a party to the proceeding to foreclose the mortgage.

Halley v. *Dubois*, 10 Robinson, 54. The purchaser of mortgaged property, in such a case, stands in the place of the mortgagor, and can make no objection to the sale and seizure, which the mortgagor could not.

Barrow v. *Bank of Louisiana*, 2 La. Ann., 453.

The mortgage sued upon in the U. S. Court by Dupasseuer, contained this pact or agreement: and the subsequent mortgage to Rochereau being an encumbrance in violation of the pact, was and is null and void as to the first mortgage. The clause *de non alienando* does not absolutely prevent a sale of the property by the mortgagor. The latter may transfer the property, subject to the right which such a clause gives to the mortgagee, of proceeding summarily against the property, as if still belonging to the mortgagor.

PER MORPHY, J., *Ducros* v. *Fortier*, 8 Rob., La., 167.

The remedy of all junior mortgagees or owners of property thus seized, is two fold. 1st, by "opposition," 2nd, by injunction. "Opposition," is a demand by way of

motion in the cause made by a third person not a party to a suit to arrest or regulate the effect of an order of seizure and sale, either when he pretends to be the owner of, or to *have a privilege* on the thing seized." C. P. 395, 6, 401, *et seq.*

"If the third person has a privilege or *special hypothecation* duly registered *anterior to that of the seizing creditor* he shall be paid the amount of his claim with interest and costs, and the plaintiff in the cause shall only receive the *surplus, if any.*" C. P., 402.

Can there be any question then, that the United States Circuit Court was the forum, where Rochereau should have applied, in order to raise the question, as to *which* was the prior mortgage under the registry laws, and to whom the proceeds were to be distributed?

In a collateral proceeding like the present, the order confirming the sale, approving the report of the Marshall, and ordering the purchase money paid into court (Record, p. 56) is conclusive.

Parker v. *Kane*, 22 How., 14.

Beauregard v. *N. O.*, 18 How., 49.

The proceedings by injunction are regulated by Arts. 739, 743, C. P., which need not be quoted here.

The following are some of the most important cases bearing on the subject: In *Stanbrough*, v *McCall* (4 La. Anl. Rep., 325) the previous cases were searchingly reviewed and affirmed. SLIDELL, J., giving the opinion of the court in that case, says:

"Now the mortgage from McCall contains the covenant *de non alienando.*" The effect of this covenant has been frequently considered. In *Nathan* v. *Lee*, 2 Martin, N. S., 33, it was said that a mortgage creditor who acts on a mortgage which contains in his favor an agreement of the debtor not to alienate, is not bound to pursue a third possessor by the action of mortgage, but may have the hypothecary property seized *via executiva*

as if no change had taken place in its possession; because *any alienation or transfer* made in violation of the *pact de non alienando* is *ipso facto void as* to the creditor." In *Donaldson* v. *Mariner*, 1 La., 39, the effect of this pact was again considered, and the doctrine of *Nathan* v. *Lee* affirmed. It was considered as springing, not from legislation, but from the agreement of the parties. It is a general rule that owners of property must be presumed to know the titles and the encumbrances under which they hold.

In *Murphy* v. *Jandot*, 2 Rob., 378, the court said: "The mortgage to Jandot contains the clause *de non alienando* and consequently no transfer of the property would affect his right to *proceed summarily against it* as if still belonging to the mortgagor, (citing several cases). Hence then it results that Stockton holding under McCall, and well acquainted with his title, is *estopped by the pact de non alienando* from claiming a better condition than his author, and pleading any exception which McCall could not have pleaded. In *Snow* v. *Trotter et al.* 3d Anl. 269, KING, J., says: "The act (of mortgage) contains a clause of non alienation *which would have authorized the plaintiff to proceed against the property* in the hands of a third possessor in the same manner as if it had remained in the possession of the mortgagor."

Barrow v. *Bank of Louisiana*, 2 An., 455, was a proceeding by a purchaser junior to the mortgage of the bank to enjoin the bank from collecting their mortgage by executory process. SLIDELL, J. says: "The party (Barrow plaintiff) being fully estopped by his own judicial acknowledgement, from disputing the original validity of the mortgage to the bank, it remains to consider the effect of the refusal and neglect of the bank to enforce its mortgage upon the slaves. The bank held a mortgage with a pact *de non alienando*. By reason of this fact duly recorded, Barrow stands in no better positior than did the original mortgagor."

In *Donaldson* v. *Mariner* (1 La. Rep., O. S. 39), MATHEWS, J. says: "The judgment of the district court having condemned all the property mentioned in the mortgage to be sold—both lots—and it appearing that one of them is held *by a person who has in no manner been made a party to this suit*, it becomes our duty to inquire into the effect of the pact *de non alienando*." After commenting upon and affirming the rule in *Nathan* v. *Lee*, the court proceeds.

"It is an universal principle, founded in reason and law, that effect must be given to all parts of a written contract or agreement, and meaning to all its stipulations and phrases, unless such construction will lead to absurdity. It is also a general rule that owners of property must be presumed to know the title and the incumbrances under which they hold it. In applying these rules to the case under consideration, it is evident that the mortgagee intended some advantage to himself by the introduction of the clause *de non alienando* consented to on the part of the mortgagor, beyond what he would have had, without such a pact or agreement, and that the only manner in which it can have the effect intended by the parties to the contract is to *construe it into an authority to seize the property mortgaged* in the hands of third possessors without preliminary proceedings, as in case of the ordinary hypothecation. This summary process the possessors have no right to complain of, for they *knew the terms and conditions on which they held the property*."

Nicolet v. *Moreau* (13 La., O. S. 315) was an hypothecary action on a note of defendant for the purchase price of a lot of ground. The property was seized and sold. In answer to a rule to show cause why he should not comply with the terms of the sale, the purchaser urged that he had discovered since the sale, that the property *had been previously* sold to one G. T. Weiss. The rule was made absolute and he appealed.

MARTIN, J., in affirming this judgment says: "Moreau the mortgagor, bound himself not to alienate or mortgage the premises to the prejudice of his vendor or mortgagee. In *Nathan* v. *Lee* and *Donaldson* v. *Mariner*, this court held that the clause de non alienando *relieves* the *mortgage creditor* when he resorts to the hypothecary action from the obligation or necessity of pursuing all the steps required by this action, in ordinary cases, *principally to make the vendee of the mortgagor, or person in possession, a party to the executory* proceedings in the order of seizure and sale.

Moss v. *Collier* (14 La., O. S., 135) was a proceeding by executory process against mortgaged property in the hands of a third possessor.

MORPHY, J., in the opinion, says: "The appellee resists execution of an order of seizure and sale on property he holds as third possessor. 1. Because of no evidence of thirty days demand on debtor, and ten days notice to him as third possessor. We need not enquire whether this is so or not, because plaintiff's deed of mortgage contains the clause *de non alienando*. Its well-known effect is to relieve the mortgage creditor when he resorts to this action, from the obligation or necessity, of pursuing all the steps required in ordinary hypothecary suits. No oath was necessary," *he might have proceeded without any notice to defendant.*"

In *Lawrence* v. *Burthe* (15 La., 269), MORPHY, J. says: "Plaintiff is appellant from a decree dissolving and setting aside an injunction to prevent the sale of 12 lots of ground in suburb St. Mary. These lots had been sold to the plaintiff by Richard Hogan, who had purchased them himself from defendants, at whose instance an order of seizure and sale had issued under the mortgage reserved by them as vendors of said lots. The grounds of injunction were in substance, that defendants had not pursued all the formalities, and that *plaintiff was not made a party to the executory proceedings, although in possession of the premises.*

It does not appear that the judge erred. Hogan, the mortgagor, bound himself not to alienate or mortgage the property to the prejudice of his vendors and mortgagees. The well-known effect of the clause *de non alienando* is that *any alienation or transfer made* in violation of it, is *ipso jure* void as to the creditor. The latter *is not bound to pursue the third possessor*, but may have the mortgaged property seized and sold as if no change had taken place in its possessors, *and being under no obligation to make the vendee* of his mortgagor a party to the proceedings."

It will be remembered that Rochereau is simply a junior mortgagee, and not a "third possessor." Sauve, the mortgagor, was in possession of the premises when our suit was brought in the U. S. court.

A case arose in 1853, *Guesnard* v. *Soulie*, (8 La. Anl. Rep. 58,) decided by Rost, J. "At a Sheriff's sale, made under an order of seizure, issued upon a mortgage duly recorded and containing the pact *de non alienando*, the plaintiff became the purchaser of a house and lot, and was required, on the spot, to pay into the sheriff's hands the entire amount of his bid.

The certificate of mortgages, showing no other conventional mortgage, existing on the property, the Sheriff paid the claim of the seizing creditor, and the costs of suit, and gave the balance in his hands to the husband of the defendant, *Mrs. Clinton.* It appears that *Mrs. Clinton*, after giving this mortgage, had sold the land to one *John Bartley*, who gave her in part payment his note for $800, secured by mortgage on the property. This note is now in the hands of the defendants, and they have taken out an order of seizure and sale thereon which the plaintiff has enjoined. This is an appeal from the judgment perpetuating the injunction.

The effect of the pact *de non alienando*, so far as the party in whose favor it operates is concerned, is, that in contemplation of law, the property remains in the pos-

session of the original debtor, notwithstanding it may have been alienated by him; and those who purchase it or acquire real rights on it, are presumed to know the title and incumbrances under which they hold. *Donaldson* v. *Morel*, 2 L. R., 34. The mortgagee, in such a case, has a right to proceed by the *via executiva*, after the alienation, as if the property still belonged to the mortgagor. *Murphy* v. *Gandot*, 2d *R.*, 378; *Gas Bank* v. *Allen*, 4 *Rob.*, 389; *Ducro* v. *Fortier*, 9 *Rob.*, 167. The mortgage creditor, in this case, thus proceeded and gave notice of the seizure to *Mrs. Clinton; the subsequent alienation being null as to him, he had nothing to do with the mortgage resulting from those alienations*, and the plaintiff, who holds under him, stands in the same situation. If he could be evicted by the defendant's mortgage in this action, under article 711, C. P., and 2599, C. C., he would have his recourse in warranty against the mortgagor and mortgagee, and thus effect would be given against the latter to an alienation which *the law reputes null and void* as to him.

The proceedings in the suit were carried on against *Peter Clinton* and his wife. The mortgage held by the defendants was taken under the implied condition which they are presumed to know, that in a certain contingency, the title under which it arose might be treated as a nulity: and the injury resulting to them, from the happening of that condition, is not one which the party in whose favor it existed, or those claiming under him, can be called upon to redress. The case would be a very hard one if the loss of the defendants did not mainly result from the nature of the security they held, and from *their not using the degree of diligence which such a security renders necessary.* Those who hold second mortgages should, *at all times*, be informed of any proceedings which may have been had under the first. The property, in this case sold for an amount more than sufficient to pay both mort-

gages, and the want of vigilance of the defendants alone enabled their debtor to commit a fraud upon them."

Proceedings for the sale of real estate in Louisiana whether via executiva, or via ordinaria, are precisely alike, as to the formalities to be observed by the Sheriff or Marshal. C. P., 745. For these formalities, see C. P., Arts. 643 to 703.

There is no redemption from a judicial sale, under a judgment or decree of court in Louisiana. The sheriff or marshal is required to procure a certificate from the register of the parish showing all privileges or mortgages *existing upon the property offered for sale:* which he is required to read in an audible voice at the time of offering the property for sale. C. P., Art. 678, (printed record, p. 57.) Both the debtor, and creditor, may bid at the sale; C. P., 688.

When the seizing creditor is a *vendor*, or has any special mortgage on the property anterior, to the other special mortgages, he may require the property to be sold at any price to pay him, *even though the purchase money be not sufficient to satisfy all the privileges or mortgages on the property.* C. P., 685.

The two following articles indicate the effect of such a sale:

"On the other hand, if the suing creditor himself has a privilege or special mortgage which is preferable or anterior to other mortgages existing on the property sold, the sheriff shall require of the purchaser, the payment of the price, to the amount of the privilege or special mortgage of the seizing creditor, and the purchaser shall apply the surplus of the price, if there be any, to paying the special mortgages existing on the property, subsequent to that of the suing creditor." C. P., Art. 707.

"*The purchaser is bound for nothing beyond the price of his adjudication*, and if, after paying the suing creditor, as directed in the preceding article, there remains nothing

more due, to discharge the mortgages *subsequent to that of the suing creditor, the sheriff shall give him a release from these mortgages.*" C. P., 708.

The following authorities show the effect of sales under judicial proceedings similar to those under consideration, *Parkins* v. *Campbell*, 5 Martin (*new series*), Rep., 149, *opinion by* MATTHEWS, J. "Appellants being indebted to appellees transferred to them a debt which appellants held on a third person, secured by mortgage on land, which they attempted to seize, and sell. The claim was a *second installment* of a debt secured by mortgage, *under which* the mortgaged property, was regularly seized and sold, for the benefit of transferrees, was purchased by their agent, and the title transferred to one of them. *Since this sale* the order of seizure or execution complained of, in the petition for injunction, issued in favor of appellants on *a previous installment*, secured by the same act of mortgage, and which is perpetually enjoined by the judgment appealed from. We think this judgment is correct. The persons, in whom the right to the *first instalment remained, having taken no steps, to enforce their claim, until the second became due*, and the mortgaged property was *seized, and sold under it, have lost their lien* on said property, in the hands of third possessors. *The sale under the mortgage destroyed entirely its force and gave a complete title to the purchaser.*" *Passebon* v. *Prieur.*, (1 La. An., Rep. 10) was as follows:

Plaintiff purchased certain real estate at sheriff's sale, the property of Buisson, at suit of the Citizen's Bank, and united with the sheriff in a rule on the recorder of mortgages for a mandamus compelling such recorder to *erase all mortgages on the property subsequent to those of the seizing creditor.* The recorder answered that these mortgages could not be erased *without an order of court upon notice to the mortgage creditors who were to be effected by such erasure.* The rule was made absolute and the recorder appealed.

KING, J., in affirming the judgment, says: "*Where the prescribed formalities for sheriff's sales have been observed the* sheriff and recorder have no discretion left them; the former is *required* in unequivocal terms to give the release, in pursuance of which, it becomes the *the duty of the recorder, to erase the subsequent* mortgages.

The language of art 708, C. P., is free from doubt (quoting it) *Fortin* v. *Slidell*, 7 Rob., 398; *La Gourge* v. *Sumners*, 8 Rob., 175.

The practical effect of this article may be to operate occasional wrong, which would be sufficient motive for its revision by the legislature, but we must give effect to its obvious meaning, as it stands."

Wolf v. *Lowery* (10 Anl., 272) was a case precisely similar to the case at bar. Wolf obtained a judicial mortgage (judgment lien) upon certain real estate of Cobb, upon which there were prior incumbrances. Under legal proceedings based upon these incumbrances the plantation was seized and sold by the sheriff, in 1841, to Mrs. Cobb, wife of the judgment debtor, and the deeds were duly executed by the sheriff for the property.

Wolf brought this hypothecary action against the grantees of Mrs. Cobb, who were in possession; seeking to subject the property to his judicial mortgage, (precisely as Rochereau did in the present case). OGDEN J., in the opinion of the court, confirming the sale to Mrs. Cobb, says: "The first question is whether the legal title to the property vested in Mrs. Cobb, by virtue of the sheriff's sale. *We are not at liberty to go behind the judgment*, which was rendered by a court of competent jurisdiction, and is not impeached, on the ground of fraud or collusion.

The only other question, is whether the judicial mortgage of the plaintiffs, can now be enforced on the property, by reason of the failure of Mrs. Cobb, to record the deed to her, until 1847.

The execution under which sale was made, was return-

ed satisfied in 1842, and Mrs. Cobb went into possession. In 1843 she sold half the property to Lowry. The other defendants, afterwards acquired title to the other half, by sale under execution against Mrs. Cobb. *The plaintiff having caused their judgment lien, to be reinscribed before the expiration of ten years, now claim the right to have the property sold, to satisfy their judgment, disregarding the sheriff's sale,* and the effect it is supposed to have had, of extinguishing the plaintiff's mortgage, under the act of March 12, 1813, declaring sheriff's deeds null and void, unless recorded. But there are other provisions of law to be considered. Art. 685, C. P. declares: If the seizing creditor be a *vendor*, or has any privilege or special mortgage on the property, anterior, or entitled to preference over other special mortgages, *he may require* that the property be sold *at any price* to pay him, *although* the purchase money *be not sufficient, to satisfy all* the privileges or mortgages. P. Art. 690. The adjudication—*ie.* striking off the property—itself, has the effect of transferring to the purchaser, all the rights and claims which the party in whose hands it was seized, might have to the property. (C. P. Act, 708.)

There was nothing left from the price of the adjudication to Cobb, to discharge any portion of plaintiff's mortgage, and it was the duty of the sheriff to have given a release to the purchaser, from that mortgage. The price paid by Mrs. Cobb was *applied, to the extinguishment of the mortgages, having priority over that of plaintiff.* She was equitably subrogated, to the rights of the antecedent mortgages, under which the property was sold, and had the right to avail herself of any legal, or equitable defense, by which those creditors, if they *had purchased the property themselves, might have opposed the present action.*" *Judice* v. *Kerr* 8 Anl., 465.

Whatever rights the plaintiff had existed anterior to the sheriff's sale, and no objections being made to the fair-

ness or regularity of that sale, *plaintiffs as junior mortgagees, could have nothing to oppose* to the effect, which the law declared, should be given to it, of releasing the subsequent mortgages. Plaintiffs would not in any view, that can be taken of their rights, be entitled to have the property sold, to satisfy their mortgage, *without reimbursing the purchase money, on the former sale*, which has been applied to the extinguishment of the mortgages, *which stood before theirs*. *Sewell* v. *Payne*, 5 Anl. Rep. 255. *Covion* v. *Millaudon* 3 Anl. 664."

In *Stewart* v. *Allaine* (8 La. Anl. Rep. 65): Opinion by ROST, J. "The plaintiff purchased under a mortgage consented to by Dempsey P. Cain, in favor of the Clinton & P. H. R. R. Co. He is entitled to have all the subsequent mortgages, existing on the property mortgaged to the company, erased from the public record. *Fortier* v. *Slidell*, 7 Rob. 398. *Lagourge* v. *Summers*, 8 Rob. 75. *Passebon* v. *Pricur*, 1 La. Anl. 10."

Succession of Van Court jr., (11 La. An., 884). In this case, Van Court jr. bought and mortgaged certain property to Gottschalk, who transferred to Vasserat, who was subrogated, (as in our case). Van Court jr. sold to his father, who died, and the property was inventoried and sold, at probate or succession sale, as his property, to one Mallaerto. Vasserat brought his hypothecary action *against Van Court jr. alone*, seized and purchased the property at sheriff's sale. The administratrix took a rule on him, and all the other mortgage creditors, to erase all their mortgages, claiming the succession sale had extinguished them. The rule was granted and Vasserot appealed. MERRICK, J., in the opinion, says: "Vasserot's mortgage was superior to the title of Van Court, deceased; his debtor was a former holder of the property, and having his mortgage protected with the pact *de non alienando*, he had the right to pursue the property, not only in hands of administratrix, but, against any purchaser"—and reversed the judgment.

And, in the recent case of *Willis* vs. *Willis*, (22 La., Anl. Rep., 449), the same doctrine is announced. In that case it was sought to subject certain property sold by the sheriff under a first mortgage to a second mortgage, existing at time of first sale. TALIAFERRO., J., in the opinion, says: "It resulted then, that the judicial sale of the property under the older mortgage, *extinguished the subsequent mortgages, and it passed to the purchaser* free of the plaintiff's mortgage."

From the foregoing authorities, it will be seen that a party in Louisiana, acquiring subsequent rights on mortgaged property, where this pact exists, stands, as to those rights, in the shoes of the mortgagor. No matter what may be the nature of those rights, he is divested by the same proceeding that divests the mortgagor, as completely and effectually, as if he was a party to the proceeding by name. This is the law of Louisiana as recognized by an unbroken chain of decisions since 1828, even by the same court, and at the same term where this case was decided.

The proceedings in the United States Circuit Court were, therefore, of the same effect as if instituted in a State court, and were, essentially, proceedings *in rem;* for, as we have seen, they not only divested the title of the mortgagor, but extinguished the interests, of all those claiming under, or through him, by subsequent titles or liens, though such persons were not actually before the court. The Supreme Court of Louisiana designates these suits as proceedings *in rem*, because they attach to, and follow the property, and are carried on *against the property*, irrespective of the question of ownership or interest. It is not pretended, or claimed, by the learned counsel for the defendant in error, that the sale made by the marshal would not have had the effect, under the law of Louisiana, to extinguish the Rochereau mortgage, if the Dupasseur mortgage was, at the date of filing the suit, a valid and

existing mortgage. We have seen that the only place where this question could be raised, was in the United States Circuit Court, whose process authorized the sale, and whose officers, held the proceeds in their custody after the sale was made.

The case of *Britton & Koontz* v. *Janney*, (21 La. Anl., 204) cited by Supreme Court of La., in the opinion in the present case, was a *direct proceeding* in the court where the sale was made and proceeds deposited. And the court there said: "The non-alienation clause *dispenses with the necessity of notice to any third possessor* of the mortgaged property, and plaintiffs could foreclose their mortgage contradictorily with the *mortgagor*, just the same as if the property remained in the hands of the mortgagor."

Harang v. *Plattsmier*, (21 Anl. 426,) cited by the court in same opinion, was also a *direct proceeding* instituted in the court which sold the property and held the proceeds. The court says, (p. 427): "The property mortgaged has been sold, *and the contest is over the proceeds thereof.*" This distinction was manifestly lost sight of by the Supreme Court of Louisiana.

How the State courts could entertain such a suit as the present, and, in the light of these decisions, render the decree under review, passes comprehension.

Fortunately for Dupasseur, an opportunity is presented by the present proceeding, for rectifying this mistake, and giving effect to the law, as it has existed since Louisiana became a State.

Respectfully submitted.

ALLAN C. STORY,
For Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 82.

EDWARD DUPASSEUR, PLAINTIFF IN ERROR,

vs.

ALBIN ROCHEREAU, DEFENDANT IN ERROR.

FURTHER BRIEF FOR DEFENDANT IN ERROR, CALLED FOR BY THE COURT.

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Judd & Detweiler, Printers.

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FURTHER BRIEF FOR DEFENDANT IN ERROR, CALLED FOR BY THE COURT.

Brief filed by the undersigned, of counsel for the defendant in error, upon the question submitted for argument by the court, in its order of December 14, 1874, to wit:

"Whether the proceeding in the circuit court of the United States, instituted by Edward Dupasseur, for enforcing the vendor's privilege on the property in controversy, was or was not, by the law of Louisiana, a proceeding *in rem*, binding on Rochereau and all other persons claiming liens thereon, without making them actual parties?"

Before undertaking to answer this question it is important that we should clearly apprehend its purport, and attach the same meaning to its terms. In this respect three things strike us as requiring some preliminary explanation, for the purpose of relieving the question of extraneous matter and preventing a misunderstanding of its bearing.

I. The terms of the question speak of "the property in controversy," as if, in the mind of the court, there had been

an issue of title presented for adjudication in the litigation in the State courts, out of which the present writ of error has arisen. In Louisiana the issue raised and decided in that litigation, is not considered one of title to property, as may be seen at a glance by reference to the petition by which it was commenced, (Record, 1–2,) or the judgment of the supreme court of Louisiana of the 22d June, 1870, (74-5,) by which it was terminated, so far as the State courts were concerned. In Louisiana practice the character of the action is determined by the prayer of the petition and the nature of the remedy or relief there asked for.

Hennen's Dig., vol. 2, p. 1499, (5) 2.

The form of action adopted in this instance is the hypothecary action proper, (C. P., 61, 62, 68,) the use of which is familiar to the profession in Louisiana. The action for *title* to real estate is a very different one, and known as the petitory action. (C. P., 43.)

The question involved in our hypothecary action was as follows:

Whether the plantation bought by Dupasseur at the marshal's sale made on the 5th May, 1866, (18–21 or 30–33,) under the execution issued (54) on the judgment rendered in his favor against Sauvé (53–4) passed into his hands, *encumbered with the mortgage in favor of Rochereau*, which had existed upon it before the sale? What was the defence by which our action was met? We have but to refer to the answer of Dupasseur (17) for a reply to this question. The defence was, not that the property *belonged* to Dupasseur, which it was not incumbent on the plaintiff either to admit or deny, inasmuch as possession alone, in the defendant, suffices to support the hypothecary action, (Walker *vs.* Dunbar, 6 N. S., 627,) and which would not have been responsive to the issue tendered in the petition.

The defence was that there was no such mortgage affecting

the property in his hands as that there set up. Perusing the answer further, the Court will see the true issue set forth explicitly by the defendant himself, and that it turned entirely upon the question which of the two encumbrances claimed respectively by plaintiff and defendant held the *prior rank* upon the property at the time it was sold on execution under Dupasseur's judgment, and bought by him. It was a mere question of rank and seniority between two mortgages under the registration laws of Louisiana. The same answer expressly confessed the failure to reinscribe the Dupasseur encumbrance within the delays of the law, but pleaded certain matter of avoidance, upon the sufficiency of which the whole defence was made to hinge. If that failed, the defence failed, and there could be but one judgment in such a case, to wit: that the mortgage claimed by the plaintiff *did* adhere to the property in the hands of Dupasseur.

The better to illustrate a point so obvious to those who are versed in the peculiar law and practice of Louisiana—to wit: that in contemplation of that law and practice the issue involved in the litigation in question was in no sense an issue of title—we beg leave to remind the Court of the differences both in form and in legal import and effect, between the mortgage of Louisiana and that of the common law.

While the latter is a *conveyance* absolute in form, which may, by the appropriate proceeding of foreclosure, be made absolute in substance also, and thus vest the full ownership in the creditor, the Louisiana mortgage (very inaptly so called) is a mere hypothecation, the final and full effect of which is only to subject the hypothecated property to a public sale for the satisfaction of the debt for which it stood bound; at which sale either the creditor or a stranger may or may not become the purchaser, according to the amount of their respective bids.

In the case of the common-law mortgage, the decree of foreclosure vests the title in the creditor, and thus becomes to him a muniment of title; so that when that decree is at-

tacked or called in question, an issue of title to property is really and necessarily the result. Not so in Louisiana, where, under the civil law, a mortgage, though considered as the alienation of a right in the thing, is by no means a sale or alienation of the thing itself, (Duclaud *vs.* Rousseau, 2 A. R., 173,) and where the decree by which the property is brought to the block of the sheriff at the suit of the hypothecary creditor, determines only this, to wit: that the creditor has shown that he has, as against his debtor, an instrument importing a privilege or an hypothecation, legal and authentic in form, that the debtor is in default, and that the creditor is entitled to proceed to sell.

C. P., 732–5.

As to the nature and bearing of such decree, it has been long settled in Louisiana that it is so far a judgment that an appeal will lie from it, but that it is not a judgment in the true legal sense, as it issues without citation, decides no issue, and adjudicates to the party obtaining it no right in addition to those secured in his act of mortgage.

Hennen's Dig., vol. 1. p., 651, III, 5.

Least of all does such a decree—the creditor and his debtor alone being parties to it—determine any thing as to the *rank* of the mortgage or privilege which is sought to be enforced, as compared with that of encumbrances affecting the property in favor of other parties; with respect to whom it is simply *res inter alios* and void of all effect. So entirely is this the case and so completely are the rights of other encumbrancers, not parties to the proceeding, left unaffected by it, that in a suit in Louisiana to enforce a mortgage, as against mortgagor alone, evidence of the registry of the mortgage in the mortgage office is not required, for the reason that as between mortgagor and mortgagee, the mortgage produces its full effect without being recorded. (C. P., 733, 734; C. C., 3314, 3315, 3316.) It is only when the mortgage is to be

enforced in a proceeding directed against the *third possessor* of the mortgaged property (as in our hypothecary action in the present case) or against any other party having an adverse interest, that the evidence of the registry is essential, that being the only way in which effect can be given to it against third persons.

Brou. *vs.* Kohn, 12 L. R., 104.
Cassidy *vs.* Creditors, 2 Rob., 47.

We shall see hereafter how questions of rank are disposed of, under the peculiar legislation of Louisiana in relation to sheriff's sales of real estate, and the effect of such sales in releasing or not releasing the various encumbrances to which such property may be subject at the time of the sale. Suffice it here to say, that as such questions affect only the final disposition of the price of the property so sold, they leave entirely untouched the *title* to the property, as acquired at such sales.

The issue, then, in our hypothecary action was not one of title, but of mortgage or no mortgage. On that issue alone was it tried and decided in the State courts. As they held that the Rochereau mortgage stood first in rank at the time of the sale, it followed that the property could only be sold, at the suit of another creditor, *subject* to it. (C. P., 683, 684.) The judgment which ensued is that which is given in every such case, (C. P. 68,) to wit: that the purchaser must either discharge the encumbrance or the property be sold to satisfy it.

II. The terms of the question seem also pointedly to designate as the subject of special inquiry with reference to the law of Louisiana, a proceeding to enforce a *vendor's privilege* on real estate, as distinguished from the conventional mortgage under the same law. We desire, therefore, in the outset to show the Court, that as regards their effect upon the property subject to them, and especially the means by which

they are preserved or lost, there is no difference whatever between them.

Originally and in theory, the differences between the privilege and the mortgage were more considerable than now, many kinds of privilege being preferred to the mortgage. The code of Louisiana recognizes also the radical difference in the origin of the two rights, the privilege growing out of the nature of the debt, (C. C., Art. 3153,) by the mere effect of the law, without stipulations of the parties, while the common conventional mortgage is the creature of contract and consent alone, (C. C., Art. 3257,) and requires registration as the *sine qua non*, of its power to effect third persons, (C. C., Art. 3314.)

In deference to a theory of the inherent superiority of the privilege over the mortgage, the code of Louisiana to this day defines "privilege" to be a right which the nature of the debt gives to the creditor and which entitles him *to be preferred before other creditors, even those who have mortgages.* (C. C., Art. 3153.)

But this same code nevertheless makes the existence, the rank and the duration of the vendor's privilege on real estate, a mere *matter of registration*, so that in point of fact, by the law of Louisiana, the vendor's privilege, as regards its rank and its effect upon the property subject to it, stands on no higher ground, and is invested with no greater sanctity, than a conventional mortgage, provided always that the *essential conditions of registration or inscription* in the mortgage office, have been equally well observed in both cases; for it is to the rigorous observance of these conditions that both species of encumbrance are indebted for all their vitality and all their power to affect and control the conflicting rights of third persons.

A few brief citations from the code will suffice to place the views here advanced beyond the possibility of misapprehension.

Thus title XXI, chapter 7, of privileges, provides how they shall be preserved and recorded:

C. C., *Art.* 3238.—"The vendor of an immovable only preserves his privilege on the object when he has caused to be duly recorded at the office for recording mortgages, his act of sale in the manner directed hereafter." * * *

C. C., *Art.* 3239.—Relates to divers other privileges.

C. C., *Art.* 3240.—"The privileges enumerated in the two preceding articles are valid against third persons from the date of the act, if it has been duly recorded, that is to say, within six days of the date," &c. * * *

C. C., *Art.* 3241.—"When the act on which the privilege is founded has not been recorded within the time required in the preceding article, *it shall have no effect as a privilege*, that is to say, *it shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage in the meantime, which they have recorded before it.*" * * *

For familiar examples of the working of these rules of law, see, among many others, the following adjudged cases:

Porche *vs.* Le Blanc, 12 A. R., 778.

Succession of O'Laughlin, 18 A. R., 142.

Lombas *vs.* Collet, 20 A. R., 80.

As to the matter of mortgages we find, Civil Code, Title XXI, chap. 1, sec. 4, as to the rank in which they stood with respect to each other:

Art. 3297.—"Among creditors the mortgage, whether conventional, legal, or judicial, *has force only from the time of recording it*, in the manner," &c., &c.

Art. 3314, § 11.—"Mortgages are only allowed to prejudice third persons when they have been publicly inscribed on records kept for that purpose, and in the manner," &c., &c.

Art. 3315.—"By third persons are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded," &c.

Next as to the *duration* of both privileges and mortgages when once duly inscribed or registered:

Art. 3332.—"The registry preserves the evidence of mortgages *and privileges*, during *ten years* reckoning from the day of their date; their effect ceases, even against the contracting parties, *if the inscriptions have not been renewed* before the expiration of this time, *in the manner in which they were first made.*"

Kohn *vs.* McHatton, 20 A. R., 223, 508.

These texts suffice to show, and it is for that pnrpose only that they are here referred to, that by the law of Louisiana the vendor's lien and the mortgage, as regards the manner in which they act upon the property subject to them, and the mode of giving them effect and preserving them from lapsing, stand on absolutely the same footing. It follows that in the question propounded by the court nothing turns upon the fact that the proceeding there referred to was for the enforcing of a *vendor's privilege*, any more than if it had been for the enforcing of a conventional mortgage alone.

It is true that there are remedies at law attaching to the vendor's lien, which are peculiar to it. Thus, in Louisiana, the holder of the vendor's privilege for the unpaid price may at his option and under certain conditions, sue for the dissolution of the sale if he prefers that to a specific performance. (C. C., 2041.) But this is a consideration entirely foreign to the present discussion. Considered merely as encumbrances on the property, and as securities for the specific performance of the terms and conditions of the contract out of which they respectively grow, there is in Louisiana no substantial difference between them, and no greater sacredness in the one than in the other. Their original and their prolonged effects are subordinate to the same conditions of inscription and reinscription. (Hennen, 1238, § 2.) We shall see also as we proceed that there is also no difference in the remedies or actions at law provided for enforcing them.

III. As the question propounded by the Court relates especially to the particular proceedings instituted by Dupasseur in the United States circuit court, and its nature and effect with respect to the law of Louisiana, it is proper that its peculiarities, if any, should be pointed out and understood.

The form of action there pursued is the *personal* action, or action *via ordinaria*, (39–41,) (C. P., 98,) as distinguished from the executory proceeding. (C. P., 98,732.) In Louisiana the mortgage is but an accesssory contract, and has no existence apart from the debt or obligation which it is insended to secure. (C. C., 3251.) The debt is generally represented by notes negotiable in form, as it was in this instance. (43–44.) It is therefore in the power of the creditor to commence legal proceedings by taken a personal judgment against his debtor on the notes, (Gurlie *vs.* Coquet, 3 N. S., 503, 655,) under which judgment, after exhausting the mortgaged property, he can levy on any other property or effects of his debtor, if the former did not yield enough to pay him in full, (C. P., 646–8,) or he may, by the executory proceeding, (C. P., 732,) proceed *first* to exhaust the mortgaged property, and have his action for a personal judgment afterwards for any unsatisfied balance of his notes.

It was the former of these two courses that Dupasseur pursued. His petition (39–41) concludes by a prayer for a personal judgment, with recognition of his vendor's lien and mortgage for the security of it. It asks also for a writ of sequestration, on the sworn allegation (41–2) that he feared the moveables making part of the plantation might be removed and his security impaired. But there is nothing in this which changes the character of the action, the writ of sequestration being merely a conservatory and auxiliary writ, which may be used in actions either personal or real, for debt or for title to property.

C. P., 269, 271, 275, § 6.

Besides, the record shows that in the present case the sequestration, though issued, (52,) never took effect, as appears by the return of the officer charged with the execution of it, (53 ;) nor did the cause itself make any progress until February, 1866, when judgment was entered up against Sauvé by confession, (53–54.)

For the execution of this judgment the appropriate writ was the ordinary one of *fieri facias*, (C. P., 641–2,) and such a writ was accordingly issued, (54.) It differs in no respect from the common formula of that well-known writ ; but when, as in the present case, it issues on a judgment containing a recognition of a privilege or mortgage, that clause is inserted in the writ, (53–54,) and produces this effect, to wit : that the property affected with the privilege or mortgage can be levied on at once, in despite of the right to point out property for seizure, which belongs to the defendant in execution in ordinary cases ; nor has its insertion in the writ any other object or effect than to inform the sheriff that the property mentioned is exempt from the operation of the *right to point out*.

C. P., 646, 648.

Such being the writ issued in this case, the return of the marshal (55) shows how he executed it ; that he seized under it the property designated as affected with the privilege and mortgage, had it duly appraised, advertised it for sale according to law, offered it at public auction at the appointed time and place, and, finally, knocked it down to the plaintiff in execution, as the last and highest bidder, at the price of $64,151, a sum considerably exceeding that called for in the writ. In short, the proceeding designated in the question submitted by the Court as the subject of this discussion—to wit : " the proceeding instituted by Dupasseur on the first December, 1863, in the United States circuit court, for enforcing the vendor's privilege on the property in controversy"—was nothing more than an ordinary action for

recovering judgment on promissory notes, followed by an execution under which property described in the writ as affected with the vendor's privilege and special mortgage in favor of the seizing creditor, was levied on and sold, the sale being in all respects an ordinary sheriff's sale, as regulated in its minutest details by the local or State law.

C. P., 641–703.

With these preliminary explanations, we are prepared to recur to the question as propounded by the Court for argument. It is made by its terms a pure question of State law, nothing turning upon the fact that the sale was made under the authority of a Federal rather than of a State court. It really, then, resolves itself into this: Whether a personal judgment, such as that above described, (53-54,) was a judgment *in rem*; that is to say, binding on Rochereau and other persons having liens on the same property, they being in no manner parties thereto; and whether the execution of that judgment through the forms of a sheriff's sale, made under the statutory regulations of Louisiana, had the effect of a sale decreed in a proceeding *in rem*; that is to say, a sale conveying the property to the purchaser in its entirety and free of all encumbrances? We have no hesitation in answering both questions in the negative, and for the following reasons:

I. We understand the distinguishing traits of the proceeding *in rem* to consist, first, in the assumption, by the proper tribunal, of a plenary power over the thing, without personal notice to any one; and, second, in the sale of the entire estate in such thing and its conveyance to the purchaser free of all encumbrance; of which proceedings cases of forfeiture and prize, or the proceedure in admiralty to enforce maritime liens and privileges, are the most familiar examples.

There is but one proceeding in the whole catalogue of remedies at law, under the Louisiana Code of Practice or its

amendments, which is known and designated *eo nomine* as a proceeding *in rem;* and that is a subdivision of the proceeding known as the "provisional seizure," (C. P., 284.) In the five enumerated cases in which that writ may issue is the following:

"4. When the proceeding is *in rem*, that is to say, against the thing itself which stands pledged for the debt, *when the property is abandoned, or in cases where the owner of the thing is unknown or absent.*"

C. P., 285, § 4.
Gazzam *vs.* Wright, 3 L. R., 451.
Holmes *vs.* Chieftain, 1 A. R., 136.

In proceedings by attachment against an absent party not personally within the jurisdiction of the court, but brought before it through his property, the distinction between a judgment in *personam* and one *in rem* is familiar to the jurisprudence of the State, but only in a very limited sense. Thus, the early jurisdiction of Louisiana held such a proceeding to be both *in personam* and *in rem;* that is to say, it held the judgment rendered in such a proceeding good to all intents and purposes as if the defendant had been served with the process of the court.

Gray *vs.* Trafton, 11 M. R., 246.
Hill *vs.* Bowman, 14 L. R., 446.

But in 1847 that jurisprudence was abandoned, and it was thereafter held that such judgments are only *in rem*, that is to say, judgments having no force and effect *beyond the property attached.*

Broughton *vs.* King, 2 A. R., 571.
Favrot *vs.* Della Piane, 4 A. R., 586.
Page *vs.* Generes, 6 A. R., 549.

But in neither case could *real estate* be sold under such

judgments except on a writ of *fi-fa*, (C. P., 265,) and subject to the same rules as regulate sheriff's sales in ordinary cases; of which rules we shall have more to say as we proceed.

So again, in this very matter of privileges and mortgages, and of the remedies for enforcing them in Louisiana, there are two equally familiar modes of proceeding; one which is said to be *via ordinaria*, in the form of a personal action, and another, *via executiva*, or by executory process. (C. P., 97, 98, 732, 735.) But article 732, section 2, expressly warns us that the executory process is not to be confounded with the proceeding *in rem*, as defined under the "Provisional seizure" above mentioned, the two being subject to different rules. Thus, though the executory process is not commenced by *citation*, the law, nevertheless, expressly provides for *personal notice* to the debtor before the seizure of his property can take effect. (C. P., 735.) When, therefore, the executory process is sometimes spoken of as a proceeding *in rem*, it is in the same sense in which the phrase is used in relation to attachments, as we have seen above, and to distinguish it from the ordinary mode of proceeding. (C. P., 97, 98.) But what is most of all to be noted in this connection is, that the mode of selling real estate at sheriff's sale is one and the same, whether the process under which it is sold be the executory process, or an execution issued on a personal judgment.

C. P., 744, 745.
Hennen's Dig., I, 651; III, 2.

In Louisiana, sales made under the orders of the courts of probate for the settlement of the successions of deceased persons, offer the closest analogy to the proceeding *in rem*, using the term in the sense in which we suppose it to be used in the question propounded by the court for argument. By the well established jurisprudence of the State, such sales have always been expressly held to be made for the very purpose of raising and releasing privileges and mortgages, and con-

veying the property in its entirety and unencumbered to the purchaser; and this without the consent of the hypothecary creditor, the rights of all the different classes of encumbrancers being, in such cases, by the sole effect of the law, transferred from the thing to its proceeds, in the hands of the proper representative of the estate. The same, also, was true of the sales of property made under proceedings in insolvency, as long as the State insolvent laws were operative.

Hennen's Dig., I, 962, §§ 2, 8.

But, under the peculiar legislation of the State in relation to sales on execution, the effect of such sales on encumbrances existing on the property in favor of other parties than the seizing creditor, is by no means the same as in the cases just considered. To make this clear we crave the indulgence of the Court, whilst we lay before it certain positive provisions of the law, in subordination to which all sales on execution in Louisiona are necessarily made.

The first duty of the officer charged with the execution, before he proceeds to offer the property, is to procure from the mortgage office and read to the bystanders, a certificate of the register of mortgages, showing whether any and what privileges and mortgages are recorded against the property offered for sale. (C. P., 678.) That this essential formality was observed by the marshal in this case appears from the recitals in his deed of the property to the purchaser, in which the certificate of mortgage is incorporated in full, (19.)

The next article enunciates a rule of the highest importance, in measuring the effect of such sales upon the rights of third persons, and reads as follows:

"When there exists a mortgage or *privilege* on the property put up for sale the sheriff shall give notice before he commences the crying, that the property is sold *subject* to all privileges and hypothecations of whatsoever kind they may be with which the same is burdened, and with the condition that the purchaser shall pay in his hands whatever portion of the price for which the property may be adjudicated,

which may exceed the amount of the *privileges* and special mortgages to which such property is subject."

C. P., 679.

"If there exist on the property any *privileges* or special mortgages in favor of other persons than the judgment creditor, and which are preferred to him, the sheriff shall announce that the *purchaser shall be entitled to retain in his hands*, out of the price for which the property was adjudicated, the amount required to satisfy such prior encumbrances," &c.

C. P., 683.

"Consequently, if the price offered in this case by the highest and last bidder is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference over the judgment creditor, there shall be no adjudication," &c.

C. P., 684.

"If the seizing creditor be a *vendor* or has any *privilege* or special mortgage on the property seized and offered for sale, which is *anterior* to or entitled to a preference over other privileges or special mortgages existing on said property, he may, notwithstanding what is contained in the preceding article, require that the property be sold at any price to pay him, although the purchase money be not sufficient to satisfy all the privileges or mortgages with which such property is burdened."

C. P., 685.

What then, under these positive and controlling texts of the law, was the position of the parties to the present litigation, at the time of making the sale in question?

Dupasseur acted on the assumption that his position was that indicated in article 685, just quoted, to wit: that of a seizing creditor who was a vendor and who held a privilege and mortgage first in rank upon the property; and that the mortgage of Rochereau was second to his own. But just the reverse was true. The priority of the Dupasseur *privilege* and mortgage had been lost by the failure to re-inscribe them

in the mortgage office of St. Charles within the ten years from the first inscription, and the want of such re-inscription was patent on the face of the certificate of mortgages above alluded to and incorporated in the marshal's deed, (19.) The mortgage of Rochereau from second had become the first. This being the case, his rights were protected by article 684. Under that article Dupasseur, as seizing creditor, whose privilege and mortgage had become inferior to the mortgage of Rochereau, could not make a sale at all, for less than the amount required to cover Rochereau. Rochereau's mortgage was then placed under the special protection of the law itself, and no act of intervention in the proceedings by which Dupasseur sought to effect a sale of the property, was in any way incumbent on Rochereau. He could afford to wait. If no bid sufficient to cover him was made there could be no sale; if the bid was large enough for that, then a sale was effected, but the purchaser took the property *cum onere*, subject to Rochereau's mortgage, *retaining in his hands out of the bid*, as prescribed in article 683, the amount of such prior encumbrance to be paid to the party holding it, if the purchaser *chose to pay it over* rather than to allow the property to be seized and sold to satisfy such prior encumbrance.

As a further consequence of the legal position above set forth, the purchaser, Dupasseur, by the effect of his purchase, became *quoad* Rochereau, the third possessor of the mortgaged property, (C. P., 68, 709;) that is to say, that without being personally indebted to Rochereau, his property was burthened with a mortgage in Rochereau's favor, (C. P., 41, 42,) and liable to the hypothecary action, the very form of action by which this litigation was commenced in the State courts, (1–2.) Indeed, upon the *refusal of the purchaser to discharge the mortgage which thus adheres to the property*, the hypothecary action is the only remedy of the creditor.

Richard *vs.* Nolan, 3 N. S., 338.
Joyce *vs.* Poydras, 6 L. R., 283.
Page *vs.* Generes, 6 A. R., 550.

Such, under the law of Louisiana, considered both with reference to the mode of conducting it and the legal consequences that necessarily flow from it, was the proceeding designated in the question submitted by the court, and whose legal character it is the object of this discussion to ascertain.

We submit that under the law of Louisiana, it was in no sense to be considered as a proceeding *in rem*, binding on Rochereau, or on any other creditor holding encumbrances on the property of a higher rank than that of the seizing creditor.

1st. It was not a proceeding *in rem* in point of form, because under the law regulating practice in Louisiana, as we have already seen, the action is only properly *in rem* when the property is abandoned or the owner unknown or absent, (C. P., 285, § 4, 292,) which was not the case here, the suit having taken the form of an ordinary action of debt, preceded by *citation* and concluding with a prayer for a *personal judgment* against the debtor for the amount due, (41,) to which suit the defendant appeared in person, whereas the proceeding *in rem* lays hold on the property without personal notice to any one.

2d. It was not a proceeding *in rem* in substance or in legal effect, since the judgment rendered in the case could only be executed in conformity to the rules regulating sheriffs' sales, and that by reason of the law controlling such sales in Louisiana, that judgment could not deal with the property as property is dealt with under decrees which are properly *in rem*, that is to say, *could not sell it in its entirety and free of encumbrances having priority over that of the seizing creditor*, a prohibition which, under article 684, above cited, may defeat a sale altogether, whereas the characteristic feature of the proceeding *in rem*, as it affects the property condemned by the decree, is that it sells it in its entirety, free of all in-

cumbrance, and that the price for which it is sold stands in lieu of the property.

While, by article 683 of the code of practice, above cited, the purchaser is to retain in his own hands, out of the price bid, the amount required to satisfy a mortgage or privilege having priority over that of the judgment creditor, yet the lien of such prior encumbrance is not at all removed from the property, or transferred to the part of the price so retained. The portion of the price so retained remains, by the express terms of the article (C. P., 683,) in the hands of the purchaser. Of course he can, if he chooses, use it to pay off the prior encumbrance, but he cannot be forced to do so. If he does not so choose, the holder of the prior encumbrance cannot obtain any personal judgment against him for the sum, (Gale *vs.* Matta, 7 An., 140,) nor in any way lay hold of it in kind. All that the holder of the prior encumbrance can do is to bring against the purchaser, as the *third possessor*, the hypothecary action described in Art. 68 of the Code of Practice, as follows: "If the hypothecated property be neither in the possession of the debtor, nor of his heirs, but in that of a third person, the creditor has his action against that person, in order to compel him *either* to give up the property or pay the amount for which it stands hypothecated. This is the hypothecary action, properly speaking."

From this it is clear that it is at the option of the purchaser, when the property is subject to a mortgage anterior in rank to the lien of the judgment creditor, whether he will pay over the amount retained in his hands or not.

Broussard *vs.* Philips, 6 New Series, (Martin,) 310.
Smith *vs.* Blunt, 2 La. Rep., 135.

If he does not, the property will be seized and sold by order of court to satisfy the prior encumbrance, even though the purchaser has sold again. This could not be done, of course, if the lien of the prior encumbrance were lifted from the property and transferred to the part of the

price retained. It makes no difference who the purchaser is. (C. P., 688.) So far is it from being true that the lien of the mortgage first in rank is transferred to the money in the hands of the purchaser, that if the purchaser sells the property, all recourse against him in any shape ceases, and the mortgage creditor must pursue the property in other hands.

Desobry *vs.* Carmena, 9 An., 180.

Now, this position, to wit, that indicated in C. P., art. 683, is the one which, as we contend, and as the supreme court of Louisiana has decided, was occupied by Dupasseur at the sale; that is, that our mortgage had acquired a preference over his privilege and mortgage through his failure to reinscribe in time.

He, on the contrary, assumed at the sale that his position was that indicated by C. P., 685; that his privilege and mortgage had not become subordinate to our mortgage, and constituted the first lien on the property. And as he had bid a sum beyond what was due to him, he paid the difference over to the marshal.

The payment of this money to the marshal was not directed by the law. If Dupasseur had been in the position he claimed, that of the holder of a first privilege and mortgage, he should have retained the money, in order to pay the subsequent encumbrances.

C. P., 707.

Cummings *vs.* Erwin, 15 An., 289.

Nor does the record show any order of the circuit court that this money should be paid to the marshal or into court. There was a motion to the latter effect, (made in behalf of the marshal,) but no order.

Even if our mortgage had been in fact subordinate to Dupasseur's privilege and mortgage, and these had constituted the first lien, and our mortgage the second lien on the property, we should not have entirely lost our lien until he had

actually paid us the amount which he bid beyond the amount due him. Until such payment had been actually made, the property would have remained bound to us to the extent of the balance so bid, and our lien might have been enforced *pro tanto* in an hypothecary action. (See Cummings *vs.* Erwin, 15 An., 289.)

But here, again, recurs the point upon which this whole case turns. Was our mortgage in fact subordinate to the Dupasseur privilege and mortgage? If it was, then we had no case for the hypothecary action except *pro tanto*, to the extent of the sum bid by Dupasseur over his own debt.

If it was not subordinate, but entitled to a preference, then Dupasseur was in the position indicated in C. P., 683, and the proceedings in the circuit court and the sale did not divest our lien to any extent, but, on the contrary, that lien adheres to the property for the whole sum due us, and will continue to adhere to it until it is sold to satisfy the same or Dupasseur pays off our mortgage in full. The circuit court never was called upon or in a position to decide this question, and never did decide it. And whether the fact was this way or the other, our lien adhered to the property either in whole or in part; from which it follows that the proceeding in the circuit court had not the attributes of a proceeding *in rem*.

None of the points of difference between a vendor's privilege and a special mortgage, for the unpaid portion of the purchase money, came into play in the proceeding in the circuit court or in the sale under the judgment there obtained by Dupasseur. The judgment was a personal one, for so much money, and the recognition therein of a vendor's privilege and special mortgage, gave Dupasseur no other right than would have accrued to him from the recognition of a special mortgage alone, to wit: the right to have the specific property sold, even though the judgment debtor should point out other property. (C. P., 648.) And upon the sale, too, the double character of the security held by Dupasseur ceased to be of any advantage.

There was some advantage originally, no doubt, in having both a vendor's privilege and a mortgage to secure the debt. Under the vendor's privilege, for instance, the sale might have been rescinded under certain circumstances, (C. C., 2041.)

But when Dupasseur had obtained a personal judgment recognizing a special mortgage, nothing was gained by the added recognition of a vendor's privilege. The case was then as if a party in a common-law State had foreclosed in the same suit on two mortgages, executed by the same person at the same date and for the same identical debt. Under the Civil Code (arts. 3238, 3240, 3241) and the act of March 15, 1855, (Acts of Louisiana, 1855, p. 335; see Appendix,) the inscription and reinscription of the act of sale from Jacobs to Sauvé was as necessary to the existence of the vendor's privilege as to that of the mortgage, and the *privilege* was displaced from its priority over the Rochereau mortgage, just as the Dupasseur *mortgage* was, to wit, by the failure to reinscribe in time.

The pact *de non alienando* does not affect the case or the question propounded by the Court. In the first place, the act of sale to Sauvé does not appear in the record, and there is, consequently, nothing in the record to show the existence of this pact. It is not true that all mortgages or acts of sale in Louisiana contain this pact. It is a matter of express stipulation, and its effect is not to prevent the mortgagor or grantor of the privilege from alienating the property, but merely to authorize the mortgagee, or holder of the privilege to proceed against the property in the hands of a vendee or other third possessor, without taking notice of him at all, just as if no alienation had taken place, and without resort to the hypothecary action. Without this clause the property cannot be attacked in the hands of a third possessor, except by the hypothecary action.

Nathan *vs.* Lee, 2, New Series, (Martin,) 32.

Maskell *vs.* Merriman, 9 Rob., 70.

Ducros *vs.* Fortin, 8 Rob., 165.
Williams *vs.* Morancy, 3 An., 227.
Brown *vs.* Routh, 4 An., 270.

Dupasseur having chosen to proceed, *via ordinaria*, and the mortgaged property being still in the possession of Sauvé, there was no possible room left for the operation of the clause *de non alienando*.

The pact, if it existed in this case, did not dispense with the necessity of reinscription within the ten years. (Britton *vs.* Janney, 21 An., 204.) In short, the proceedings in the circuit court and upon the marshal's sale, had no other character, and produced no other effect than if there had been no vendor's privilege in the case at all, but only a mortgage.

Respectfully submitted:

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APPENDIX.

The Articles of the Civil Code and Code of Practice cited in the foregoing brief are as follows, set out in their numerical order. One citation from the Code of Practice (C. P., 641–703) is disregarded as being too long for quotation *in extenso*, though some of those articles, cited in other parts of the brief, are here set out:

CIVIL CODE.

Art. 2041. A resolutory condition is implied in all commutative contracts, in case either of the parties do not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for a dissolution, with damages, or, if the circumstances of the case permit, demand a specific performance.

Art. 3153. Privilege is a right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages.

Art. 3238. The vendor of an immoveable or slave only preserves his privilege on the object, when he has caused to be duly recorded, at the office for recording mortgages, his act of sale, in the manner directed hereafter, whatever may be the amount due to him on the sale.

Art. 3240. The privileges enumerated in the two preceding articles, are valid against third persons from the date of the act, if it has been duly recorded; that is to say, within six days of the date, if the act has been passed in the place where the registry of mortgages is kept, or adding one day more for every two leagues from the place where the act was passed to that where the register's office is kept.

Art. 3241. When the act, on which the privilege is founded, has not been recorded within the time required in the pre-

ceding article, it shall have no effect as a privilege, that is to say, it shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage in the meantime, which they have recorded before it; it shall, however, still avail as a *mortgage*, and be good against third persons from the time of its being recorded.

Art. 3251. The mortgage is accessory to a principal obligation, which it is designed to strengthen, and of which it is to secure the execution.

Art. 3257. The conventional mortgage is a contract, by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession.

Art. 3297. Among creditors, the mortgage, whether conventional, legal or judicial, has force only from the time of recording it, in the manner hereafter directed, except in the cases mentioned below.

Art. 3314. Conventional mortgage is acquired only by consent of the parties; and judicial and legal mortgages, only by the effect of a judgment, or by operation of law. But these mortgages are only allowed to prejudice third persons, when they have been publicly inscribed on records, kept for that purpose, and in the manner hereafter directed.

Art. 3315. By the words *third persons* used in the foregoing article, are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded, and who have dealt with the debtor either in ignorance or before the existence of this right.

Art. 3316. Consequently, neither the contracting parties nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulated, can take advantage of the non-inscription of the mortgage.

Art. 3332. The inscription of acts, on which the privileges are founded, when they are subjected to this formality,

as also donations, shall be made in the same manner as that of mortgages.

Art. 3333. The registry preserves the evidence of mortgages and privileges, during ten years, reckoning from the day of their date; their effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made.

Act of Legislature of Louisiana, approved March 15th, 1855, (acts of 1855, No. 274, page 335:)

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That no notarial act concerning immovable property shall have *any effect* against third persons, *until* the same shall have been recorded in the office of the parish recorder, or register of conveyances of the parish where such immovable property is situated.

SEC. 2. *Be it further enacted, &c.*, That all sales of lands or slaves made by any sheriff or other officer by virtue of any execution; all marriage contracts made within this State, tending in any wise to convey, transfer, assure, or affect the estates of the parties, or being only intended to ascertain the dotal rights of the wife, or that her marriage portion is liable to some reserves, or stipulated to be paraphernalia, or extra dotal property; all final judgments shall be recorded as follows, to wit: Where lands or other immovable property are to be affected, the recording shall be in the parish where the lands or other immovable estates shall be situated, and when slaves are to be affected, then in the parish where the party whose estate is to be affected shall have his domicile. And all sales, contracts, and judgments which shall not be so recorded shall be *utterly null and void*, except between the parties thereto. The recording may be made at any time, but shall only *effect* (sic.) third persons *from the time of recording*.

SEC. 3. *Be it further enacted, &c.*, That all laws contrary to the provisions of this act, and all laws on the same subject-matter, except what is contained in the Civil Code and Code of Practice, be repealed.

This act held to abrogate so much of the Civil Code as is inconsistent with its provisions.

Harang *vs.* Plattsmier, 21 An., 427.
Britton & Koontz *vs.* Janney, 21 An., 204.
Rochereau *vs.* Dupasseur, 22 An., 402.)

Code of Practice.

Art. 41. A real action lies against him who, without having contracted any obligation towards the plaintiff, is nevertheless bound towards him as possessor of the immoveable property of which that plaintiff claims the ownership or the possession, or on which he claims to exercise some immoveable right.

Art. 42. The real action gives the right to follow the thing in whatever hands it may be found; but as relates to hypothecary actions, this rule is subject to some modifications which are established in the paragraph which treats of that action.

Art. 43. The petitory action, or one by which real property, or any immoveable right to such property, may be subjected, is claimed, must be brought against the person who is in the actual possession of the immoveable, even if the person having the possession be only the farmer or lessee.

Art. 61. An hypothecary action is a real action, which the creditor brings against the property which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt.

Art. 62. The hypothecary action, like all real actions, follows the property to which it is attached, in whatever hand it may be found, but is subject to different rules, according as the property may be in the possession of the debtor, of his heirs, or of third persons.

Art. 68. If the hypothecated property be neither in the possession of the debtor nor of his heirs, but in that of a third person, the creditor has his action against that person, in order to compel him either to give up the property, or pay the amount for which it stands hypothecated. This is the hypothecary action, properly speaking.

Art. 97. Civil actions may be prosecuted, according to the nature of the case, by three kinds of proceedings, to wit: Ordinary, executory, or summary.

Art. 98. The proceedings are ordinary, when *citation takes place*, and all the delays and forms of law are observed.

They are executory, when seizure is obtained against the property of the debtor, *without previous citation*, in virtue of an act or title, importing confession of judgment, or in other cases provided by law.

They are summary, when carried on with rapidity, and without the observance of the formalities required in ordinary cases, as when courts provide for the administration of vacant successions, and the property of minors and absent heirs.

Art. 265. In suits where attachment is demanded, after answer filed, or if the defendant has failed to answer, the plaintiff must proceed in the ordinary form to obtain judgment, and on execution of the same, have so much of the property attached and sold as will suffice to satisfy the judgment.

Art. 269. Sequestration is a mandate of the court, ordering the sheriff, in certain cases, to take in his possession and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing. This is what is properly called a judicial sequestration.

Art. 271. All species of property, real or personal, as well as the revenue proceeding from the same, may be sequestered.

Art. 275. Sequestration may be ordered, at the request of one of the parties in a suit, in the following cases:

* * * * * * § 6. A creditor by special mortgage shall have the power of sequestering the mortgaged property, when he apprehends that it will be removed out of the State before he can have the benefit of his mortgage, and will make oath of the facts which induced his apprehension.

Art. 284. The plaintiff may, in certain cases, hereafter provided, obtain the provisional seizure of the property which

he holds in pledge, or on which he has a privilege, in order to secure the payment of his claim.

Art. 285. Provisional seizure may be ordered in the following cases:

* * * * * § 4. When the proceedings are *in rem*, that is to say, against the thing itself, which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent.

Art. 646. With the exceptions mentioned in the two preceding articles, and if the party prosecuting the execution of the judgment, has no privilege or mortgage on the property of the debtor, the sheriff must commence by seizing the moveable property; if there be not moveables, he may seize slaves, and if there be no slaves, he may seize the immoveables, unless the debtor point out himself to the sheriff what property he wishes to have seized and sold first: Provided the property thus pointed out be situated in the parish.

Art. 647. But if the debtor has neither moveable, nor slaves, nor immoveable property, the sheriff may seize the rights and credits which belong to him, and all sums of money which may be due to him, in whatsoever right, unless it be for alimony or salaries of office.

Art. 648. The debtor shall not have the right of pointing out to the sheriff the property which he wishes him to seize, when the creditor who prosecutes the execution of the judgment has a *privilege* or mortgage on part of his property, for in this case the creditor shall have a right to direct the seizure of such property as is mortgaged to him, if he prefers it; but with respect to other property, not subject to his claims, he must conform to the directions above given.

Art. 678. If they are slaves, lands, or other objects susceptible of being mortgaged, which are to be sold, the sheriff, after having declared of what they consist, as directed in the preceding article, shall also read, in an audible voice, the certificate which he shall have obtained for this purpose from the office of the register of mortgages in the parish where the sale is made, to show whether there exist any *privileges* or mortgages on the property offered for sale.

Art. 679. When there exists a morgage or *privilege* on the property put up for sale, the sheriff shall give notice, before he commences the crying, that the property is sold subject to all *privilege* and hypothecations, of whatsoever kind they may be, with which the same is burthened, and with the condition that the purchaser shall pay in his hands whatever portion of the price for which the property shall be adjudicated, *may exceed* the amount of the privileges and special mortgages to which this property is subject.

Art. 683. But if there exist on the property any *privileges* or special mortgage in favor of other persons than the judgment creditor, and which are preferred to him, the sheriff shall announce that the purchaser shall be entitled to retain in his hands, out of the price for which the property was adjudicated, the amount required to satisfy the privileged debts and special hypothecations to which the property sold was subject, but that he shall be bound to give his obligation for the surplus of the purchase money, if there be any, and subscribe his obligation at twelve months' credit, with security, as is stated above.

Art. 684. Consequently, if the price offered in this case by the highest and last bidder, is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference over the judgment creditor, there shall be no adjudication, and the sheriff shall proceed to seize other property of the debtor, if there be any.

Art. 685. If the seizing creditor be a vendor, or has any *privilege* or special mortgage on the property seized and offered for sale, which is anterior, or entitled to a preference over other privileges or special mortgages existing on said property, he may, notwithstanding what is contained in the preceding article, require that the property be sold at any price to pay him, although the purchase money be not sufficient to satisfy all the privileges or mortgages with which such property is burthened. (See French text.)

Art. 688. The debtor may himself bid for his property seized and offered for sale *on the same terms as every other person.* The case is the same with respect to the judgment creditor.

Art. 707. On the other hand, if the suing creditor himself has a *privilege* or special mortgage, which is preferable or anterior to other mortgages existing on the property sold, the sheriff shall require of the purchaser the payment of the price, to the amount of the privilege or special mortgage of the seizing creditor, and the *purchaser shall apply the surplus* of the price, if there be any, to paying the special mortgages existing on the property subsequent to that of the suing creditors.

Art. 709. The hypothecary action lies against the purchaser of a property seized, which is subject to *privileges* or mortgages in favor of such creditors as have said *privileges* and mortgages, in the same manner and under the same rules and restrictions as are applicable to a third possessor of a mortgaged property.

Art. 732. Executory process can only be resorted to in the following cases:

1. When the creditor's right arises from an act importing a confession of judgment, and which contains a *privilege or* mortgage in his favor.
2. When the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought.

The proceeding by provisioual seizure, (attachment,) or *in rem* resembles in some sort the executory process, but should not be confounded with it, as they are subject to different rules.

Art. 733. An act is said to import a confession of judgment, in matters of *privilege* and mortgage, when it is passed before a notary public, or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage.

Art. 734. When the creditor is in possession of such an act, he may proceed against the debtor or his heirs, by causing the property subject to the privilege or mortgage to be seized and sold, on a simple petition, and without a previous citation of the debtor, in the manner laid down in the third paragraph, second section, third chapter of the first part of

this code. (Arts. C. P., 61–74, of the hypothecary action and of its rules.)

Art. 735. In obtaining this order of seizure, it shall suffice to give three days' notice to the debtor, counting from that on which the notice is given, if he resides on the spot, adding a day for every twenty miles between the place of his residence and the residence of the judge to whom the petition has been presented.

Art. 744. The executory process in matters of *privilege* and mortgage may be pursued, not only against the debtor or his heirs, but also against the third possessor of the things subjected to it, according to the forms prescribed in the 3d paragraph, 2d section, 3d chapter of the first part of this code. (Arts. C. P., 61–74, of the hypothecary action and of its rules.)

Art. 745. When the sheriff sells property which he has seized conformably to the provisions contained in this chapter, he must cause the same appraisements to be made and observe the same delays and formalities as are prescribed *for the sale of property seized in execution.*